VIRGINIA COALITION FOR OPEN GOVERNMENT

Regarding:
Virginia Supreme Court's proposed rules for public access to judicial records

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INTRODUCTION

The Virginia Coalition for Open Government ("VCOG") is a 501(c)(3) nonprofit organization founded in 1996 that works to ensure public access to state and local government records, meetings and proceedings. Though the bulk of our education and advocacy centers around the Virginia Freedom of Information Act ("VFOIA"), we have also weighed in on legislative proposals that affect access to records maintained by clerks of court, as well as in legislative studies and Supreme Court studies involving electronic access to judicial case records.

During the 2018 General Assembly session, Karl Hade, Eddie Macon and Kristi Wright of the Office of Executive Secretary ("OES") took time to meet with VCOG to discuss our concerns with proposed legislation (SB727) to remove the judiciary from VFOIA. Mr. Macon and Ms. Wright again met with VCOG after release of these proposed rules on Access to Judicial Records ("the Proposal"). VCOG would like to take this opportunity to thank these OES officials for taking the time for both of these meetings, and for alerting VCOG to the imminent release of the Proposal on Oct. 19.

VCOG is also appreciative of the opportunity to submit comments in response to the Proposal, though it was VCOG's hope that members of the access community, the press, public interest groups and/or citizens would have been included in the process that led to the development of this draft.

OVERVIEW

The Proposal is made up of 8 rules, ranging from the scope and definition sections (Rules 11:1 and 11:2) to those covering "Records of Judicial Officers" (Rule 11:3), those covering "Records of the Office of the Executive Secretary" (Rule 11:4), procedures for obtaining access to both (Rule 11:5), access to "Other Entities of the Virginia Judiciary" (Rule 11:6), and ending with procedures for reconsidering denials of records (Rules 11:7 and 11:8).

VCOG starts from the premise that while the courts should develop rules that apply to some records within their possession and control, there are other records and entities covered by the Proposal -- namely, the OES -- that should adhere to VFOIA rules governing access.

VCOG's premise is founded on two tenets. First, that the OES is a public body subject to VFOIA, and second that there are certain records held by the judicial branch — the OES, court personnel and even judicial officers — that should be treated as public records under VFOIA.

The OES as a public body

VCOG agrees with the analysis of the Virginia Freedom of Information Advisory Council in Advisory Opinion 01-09 that says the OES is a "public body" as defined by VFOIA, 2.2-3701.[1]

> OES is an office created by statute to be the court administrator for the Commonwealth, and that the Executive Secretary is appointed by and holds office at the pleasure of the Supreme Court of Virginia. It therefore appears that OES, like a circuit court, is also an agency of the Commonwealth supported wholly or principally by public funds and therefore likewise is a public body subject to the provisions of FOIA.[2] (footnote omitted)

The council affirmed this opinion six years later in Advisory Opinion 03-15.[3]

"Public records" within the judicial branch

VCOG is of the belief that some records should be governed by rules such as the Proposal, but others should be treated as "public records" as defined by VFOIA.[4]

In VCOG's opinion, there are essentially four basic categories of records that the judicial branch maintains.

I. **Court case records**, such as petitions, briefs, motions, etc., of pending cases, plus opinions, orders, exhibits, etc., of completed cases.

II. **Records reflecting the deliberative process in individual cases**, such as the notes, drafts, research, attorney work-product and draft opinions of judicial officers and court personnel., and other records that reflect the deliberations of individual judges, panels of judges and their clerks.

III. **Records related to the administration of Virginia's system of justice**, such as case statistics, aggregated data or reports evaluating the effectiveness of, say, a drug court.

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[1] § 2.2-3701. "Public body" means "any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth . . . and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds."

[2] https://www.opengovva.org/foi-opinions/ao-01-09

[3] https://www.opengovva.org/foi-advisory-council-opinion-ao-03-15

[4] § 2.2-3701. Public records" means "all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business." (emphasis added)

IV. **Records related to the administration of the courts as any other government agency**, such as payroll or procurement records, reimbursement forms, safety inspections, etc.

Access to **Category I** is guaranteed by the First Amendment, common law, rules developed by the courts, and statutes covering courts of record and courts not of record. The Proposal would not cover these records.

Access to **Category II** would be governed by the Proposal, as these records are part of a judicial deliberative privilege necessary to protect the finality, fairness, independence and impartiality of the judicial branch when adjudicating cases and controversies brought before it. VFOIA and case law recognize similar privileges and zones of private deliberations for the governor and members of the General Assembly.

Category III and **Category IV** records should be subject to the rules set forth in the VFOIA, not the Proposal, because they are similar to those records prepared or owned by, or in the possession of all other branches and levels of government — including clerks of court and commonwealth attorney offices.

With these two principles in mind, VCOG adds these additional comments directed at specific provisions of the Proposal.

RULE 11:1

The scope of the Proposal, set forth in **subsection (a)** of Rule 11:1, attempts to balance "reasonable access to records of the judicial branch" against "privacy, confidentiality, the administration of justice, and the best interest of the Commonwealth."

It is a lopsided balance for three reasons:

1. Access is based on reasonableness standard rather than a fundamental right of the public to oversee and hold this taxpayer-funded branch of government accountable;

2. "Confidentiality" is placed on the opposite side of the balance without any definition or regard to policy as to whose confidentiality is being protected, for what or why; and

3. The public's right of access on one side is pitted against the "best interests of the Commonwealth," without any definition or regard to policy. In criminal cases, the Commonwealth is the people. Is that the Commonwealth referred to here, or is it the government generally? Is it the judicial branch specifically?

These are not merely rhetorical questions. The public's right to know what the government is doing and how it is exercising the power the people have endowed it with is absolutely fundamental to our democratic process.

VFOIA pays respect to that fundamental right in its policy statement. It acknowledges the primacy of the public's right, rather than weighting the calculus heavily in favor of the government.

> The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times *the public is to be the beneficiary of any action taken at any level of government*. . . . All public records and meetings shall be presumed open, unless an exemption is properly invoked. . . . The provisions of this chapter shall be liberally construed to *promote an increased awareness by all persons of governmental activities* and afford every opportunity to citizens to witness the operations of government.[5] (emphasis added)

The Supreme Court has recognized the need for public accountability when writing of access to judicial proceedings, saying the public's presence ensures that proceedings are conducted fairly, safeguards against secret bias or partiality, and imparts legitimacy to the judiciary's decisions.[6]

Finally, in keeping with VCOG's two premises, the first sentence of **subsection (b)** should not include reference to "administrative records."

RULE 11:3

Subsection (a) declares that the records of judicial officers covered by Rule 11:3 are "not publicly accessible." That blanket statement means that any and all records in a judicial officer's possession would not be accessible, even those not related to cases or controversies before the court.

Presumably this would cover the handwritten notes (or copies thereof) former Judge Kurt Pomrenke sent to a potential witness is his wife's federal corruption trial.[7] Copies of letters submitted to influence a county courthouse referendum — even if those communications did not violate judicial canons of ethics[8] — would be of interest to the public yet could be withheld from disclosure.

Subsection (b) details 10 categories of records that fall under (a) and are thus also inaccessible. Yet, the first sentence of (b) says that the rule applies to records that "include, but are not limited to," a phrase that essentially

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[5] § 2.2-3700

[6] See *Daily Press, Inc. v. Commonwealth of Virginia*, 739 SE 2d 636 (2013)

[7] See "Virginia suspends ex-Juvenile Court Judge Pomrenke's law license," *Bristol Herald Courier,* Nov. 28, 2018. https://www.heraldcourier.com/news/virginia-suspends-ex-juvenile-court-judge-pomrenke-s-law-license/article_30020596-b7ec-5fec-bb46-48b640f82857.html

[8] *See* "Retired judges in hot water over outspoken views on referendum," *The News Virginian*, Feb. 9, 2017. https://www.dailyprogress.com/newsvirginian/news/politics/retired-judges-in-hot-water-over-outspoken-views-on-referendum/article_103983de-ef31-11e6-8547-c3dc579e29d4.html

swallows the rule. Any number of records or record categories outside the 10 listed could be included within the pool of records that are "not publicly accessible" at some point.

Also:

- **Subsection (b)(ii)** is open-ended and should be limited to research on cases and controversies as subsection (b)(i) is.
- **Subsection (b)(iii)** should not include communication that "may" come before a judicial officer, as anything and everything could, at some point, lead to a case that could go before a judicial officer.
- **Subsection (b)(vii)** refers to records that "could" compromise the listed systems. "Could" is open-ended and subjective. Similar exemptions in VFOIA related to system or facility security use the word "would," which narrows the scope by tying the exemption to a demonstrated harm, not a theoretical one.
- **Subsection (b)(viii)** should be limited to communications about court cases and the deliberations on those cases. As discussed above, in subsection (a), whether or not communications are to be publicly accessible should be evaluated based on the records' content, not because they are among and between judicial officers and court personnel. Throughout all other branches and levels of government, communications among and between government employees are public records that can be requested under VFOIA and withheld only if an exemption or other law applies to the records' content. There is no policy rationale for why the judicial branch should be the benefactor of a blanket ban on release of its discussions about non-case specific, non-exempt matters.
- **Subsection (b)(x)** again uses the word "confidential," which has no definition and can be interpreted to mean anything judicial officers say it means.

RULE 11:4

Again, VCOG's position is that the OES is a public body subject to VFOIA. Consequently, the whole of Rule 11:4 is problematic because it proceeds on the assumption that this statutorily created entity can operate under a different set of rules of access from other agencies.

As in a clerk of court's office or a commonwealth attorney's office, there will be records the OES maintains that are related to specific cases that can and should be subject to this Proposal. But for the public records about the administration of Virginia's system of justice or the administration of the courts as any other government agency, VFOIA should apply.[9]

[9] At least through 2017, according to public records obtained from the Library of Virginia, the OES has followed the rules and schedules for destruction of its records contemplated by the Public Records Act, §§ 42.1-76 et seq.

In comments made prior to oral arguments in January 2018, Chief Justice Lemons noted that the courts employ more than 3,000 people and process roughly $750 million in financial transactions.[10] How those people operate and how those transactions are processed, collected and spent are but a few of the operational records the public should have access to under VFOIA, just as if they were kept by any other public body.

Notwithstanding the above, VCOG offers the following specific comments:

- **Subsection (a)(i)** states that "financial records" will be publicly accessible, but this term is undefined. Further, while records about the way money is spent by the courts is important, there are also a multitude of other records that apply to the operation of the court system — from facilities maintenance to contracts for goods, or occupational safety to law library policies — where public access does not appear to be guaranteed by the Proposal.

- **Subsection (a)(iii)** states that policies will be publicly accessible,"other than those determined to be confidential" by (b)(ii). As previously noted, "confidential" is not defined and lacks standards.

- **Subsection (b)(i)** should include language limiting it to specific cases and controversies.

- **Subsection (b)(ii)** gives the OES and the chief justice limitless ability to deem a policy confidential, which undermines subsection (a)(iii)'s statement that policies will be publicly accessible.

- **Subsection (b)(iii)** should not bar access to draft reports. Under VFOIA, even drafts fall within the definition of public record.

- **Subsection (b)(iv)**, like Rule 11:3(b)(viii), makes all communication, regardless of content, off limits. There should not be a blanket ban on the release of Category III and Category IV records under this section. Some may be exempt or prohibited from release by other laws, but placing them all in the category of "not publicly accessible" insulates court personnel from public scrutiny not afforded to other governmental entities or employees in the state.

- **Subsection (b)(vii)** is broader than a similar provision for critical infrastructure in VFOIA,[11] which includes language that ties the exempt records to the safety of those using the buildings and systems and specifically includes language about what the exemption does not include, such as the structural or environmental soundness of a structure, or when there is an inquiry into the performance of the structure in the event of a disaster.

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[10] See "Virginia Appellate News & Analysis by L. Steven Emmert, Jan. 16, 2018: http://virginia-appeals.com/update-on-recent-appellate-developments-9/#.XABDQi3MzYU (under the subheading, "A newsworthy day").

[11] § 2.2-3705.2(14).

- **Subsection (b)(viii)** should not extend to "training materials" used for certification, nor to the open-ended "other materials." Protecting test questions, scoring keys and examination data is consistent with the personnel and test/examination exemptions of VFOIA.[12]

RULE 11:5

VCOG appreciates the effort to track many of VFOIA's procedures for accessing records. We have two recommendations here:

- **Subsection (c)**'s last sentence should include a provision that gives the requester the right to a refund of the difference between an amount paid in deposit and any final, lesser charge.

- **Subsection (d)** should require a response/denial to be in writing.

RULE 11:6

Rather than create a presumption of inaccessibility to all records of all work groups, **subsection (b)**'s presumption should be flipped to say work groups are presumptively open, but that the Chief Justice or the OES will determine and announce at the time of the body's creation what level of records-protection is required.

For the same reasons expressed under Rule 11:4(b)(iii), the public should have access to draft reports, comments, etc., under **subsection (c)**, at a minimum after the final report is issued.

RULE 11:7 AND RULE 11:8

VCOG appreciates the effort to add an appeal process to request denials. It is not unusual in other states to have the first step of appeal go to a different person or department within the same entity that has denied the request.

It is far less usual for the final appeal to be to the same entity, though. VCOG recommends designation of a body that does not have an interest in upholding a decision to withhold records.

[12] §§ 2.2-3705.1(1) and (4)

Furthermore, should a denial be reversed — granting access to the requester — the rules should provide for the reimbursement of some or all of the requester's costs and attorney fees, as VFOIA provides.

CONCLUSION

The judicial branch of Virginia's government exerts enormous influence over Virginia citizens, all of whom have a democratically necessary interest in monitoring the branch's performance. True transparency of government is based not on what the government unilaterally says is accessible. It is based on access to records the public has determined would help them evaluate the system's performance.

Certainly there are public policy considerations, such as the protection of public safety, investigations and existing privileges, that will necessitate the withholding of certain records, but these exceptions should be narrowly tailored to cover only those records that could truly impact those considerations.

The VFOIA has for 50-plus years provided a solid and consistent framework for government and the public to follow when requesting and disclosing public records. Judicial officers, court personnel and the OES should follow these rules with respect to Category III and Category IV records, while keeping those records related to the deliberation and adjudication of cases and controversies subject to rules of their own creation.